Supreme Court U.S.
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MAY 2 1902
JAMES H. McKENNEY,
Clerk.

No. 221.

Motion to amend decree.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed May 2, 1902.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

v.

HENRY C. KING.

MOTION.

S. D. HATFIELD and
NANCY C. RUTHERFORD,
By W. P. HUBBARD,
C. W. CAMPBELL,
HOLMES CONRAD,
Their Counsel.

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S. D. HATFIELD AND NANCY C. RUTHERFORD,
APPELLANTS,

v.

HENRY C. KING.

S. D. Hatfield and Nancy C. Rutherford, appellants in the above-entitled cause, in which the opinion and judgment of this court were delivered on the 24th day of February, 1902, come again, by counsel, and move the court to so amend its order remanding said cause to the circuit court as that the same may, by its express terms, provide that the cause "be remanded to the circuit court of the United States for the southern district of West Virginia," and for grounds of said motion they assign the following, viz:

(1.) By act of Congress approved January 22, 1901 (56 Congress, sess. 2, chap. 105), entitled "An act to divide the State of West Virginia into two judicial districts," it is provided in section 8:

> "And all causes and proceedings of every name and nature, civil and criminal, now pending in the courts of the judicial district of West Virginia as heretofore constituted, whereof the courts of the southern judicial district of West Virginia, as hereby

> constituted would have had jurisdiction if said district, and the courts thereof had been constituted when said causes and proceedings were instituted, shall be, and are hereby transferred to and shall be proceeded with in the southern judicial district as hereby constituted and jurisdiction thereof is hereby transferred to and vested in the courts of the said judicial district of West Virginia, and the records and proceedings therein and relating to said proceedings and causes shall be certified and transferred thereto."

With a proviso thereto—

> "that all motions and causes submitted and all causes and proceedings, both civil and criminal, including proceedings in bankruptcy, now pending in said judicial district of West Virginia, as heretofore constituted, in which the evidence has been taken in whole or in part, before the present district judge of the judicial district of West Virginia, as heretofore constituted, or taken in whole or in part and submitted and passed upon by said district judge, shall be proceeded with and disposed of in said northern judicial district of West Virginia, as constituted by this act."

That the final decree in this cause was made on the 2d day of June, 1900, and the order allowing the appeal therefrom to this court was made on the 1st day of December, 1900, and the cause was pending on appeal in this court when the act of Congress of January 22, 1901, was passed and became the law.

That this case does not fall within any of the conditions recited in the proviso to that act, because there was no evidence taken in the cause, and the district judge did not pass upon any evidence in his adjudication of the cause, but that the same was apparently submitted and was decided on a demurrer to the bill alone.

(2.) That the order remanding the cause to the circuit court instructs that court "to set aside the decree as well as

the appearance of defendants, and to proceed thereafter in accordance with law; and also to make a full investigation, in such manner as shall seem to it best, of the various charges of misconduct presented in the motions filed in this court, and to take such action thereon as justice may require."

This order does not expressly indicate to which of the two recently created judicial districts of West Virginia the cause is remanded, but in the opinion of the court it is said:

> "It is fitting that this investigation should be had in the first place in the court where the wrong is charged to have been done and before the judge who, if the charges are correct, has been imposed upon by counsel, and it may be wise that both examination and cross-examination be had in his presence."

The judge who presided in the circuit court, where the wrong was alleged to have been done, was the Honorable J. J. Jackson, who is now the judge of the newly created district of West Virginia, known as the northern district.

This cause is one which, under the conditions prescribed by the act creating the new districts, falls within the southern district and is within the jurisdiction of the circuit court for the southern district of West Virginia. The circuit court for the northern district of West Virginia never had jurisdiction of the cause, and under the act of Congress it would seem that exclusive jurisdiction thereof was conferred upon the circuit court for the southern district. If, upon the consideration of this motion, it should be ascertained that the court of the northern district has not jurisdiction in the cause, it is respectfully submitted that the order should be amended so as to indicate the circuit court of the southern district as the one to which the cause is remanded.

(3.) There are two objections to having the investigation suggested conducted under the supervision of Judge Jackson,

who presided in the circuit court at the hearing of the cause, which it may be indelicate more fully to indicate, but which his opinion in this case and the affidavit of Mr. Flesher may perhaps render apparent to the discriminating reader.

Appellants, through their counsel, submit the motion to have the order of this court so amended as to require that the cause be remanded to the circuit court of the southern district of West Virginia, where it properly belongs, and where the district judge, sitting, it may be, with Judge Goff, will render dispassionate and sound justice.

S. D. Hatfield and
Nancy C. Rutherford,
By W. P. Hubbard,
C. W. Campbell,
Holmes Conrad,
Their Counsel.

Office Supreme Court U. S.
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Add'l Brf. of Conrad for Appt.
(On mo. to amend)

Supreme Court of the United States

OCTOBER TERM, 1901.

Filed May 9, 1902.

No. 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

vs.

HENRY C. KING, APPELLEE.

The counsel for appellee has obtained leave to present his objections to the motion submitted to the court, to so amend the order made in the case as to direct that the case be remanded to the circuit court for the southern district of West Virginia. What the grounds of his objection may be can only be now conjectured.

Whether the case be remanded to the northern or to the southern district must depend altogether upon which of these districts would have had jurisdiction of the case "if said district and the courts thereof had been constituted when said cause and proceedings were instituted."

By the act of Congress of January 22, 1902, dividing West Virginia into two judicial districts, the counties of West Virginia which constitute the two several judicial districts are specifically designated.

In the category of counties constituting the southern dis-

trict appears the county of Kanawha, in which lies the city of Charleston, the capital of the State.

The circuit court of West Virginia, as originally constituted, had several places of session in that State; among these places was Charleston; and the first inquiry here is, Was this case pending in the circuit court of the United States for the district of West Virginia, at CHARLESTON?

If obscurity exists in the original record on this point it is to be attributed to the very irregular manner in which the case got upon the docket of the court at all. It was never at rules. It was never in the clerk's office. No entry exists of the institution of the suit The bill of complaint and the demurrer of the self-constituted attorney for the appellants were placed together in the hands of the judge, who proceeded with zeal to prepare his elaborate opinion and judgment.

The obscurity which veils the transaction is not, however, altogether impenetrable. Some rays of light gleam from the record.

On page 47, original record, appears the appeal bond, in which it is recited that the case was pending at Charleston.

In the pamphlet entitled "Petitions and Exhibits" will be found, on page 84, "Exhibit No. 17," which is the certificate of the clerk of the newly erected court of the southern district, from which it appears that the record and papers of this case are in his custody as such clerk. There is on the next preceding page another certificate of the same clerk, filed as "Exhibit No. 16," from which it appears that the ejectment suit for these same lands was pending in the court at Charleston. Again, in the affidavit of U. E. Chilton, "Exhibit No. 2," it is stated, on page 43, that "the said Henry C. King instituted a suit in equity in the circuit court of the United States for the district of West Virginia, at Charleston, against one Sarah D. Hatfield and Nancy C Rutherford," &c. Again, on page 61 of "Petitions and Exhibits," appears the declaration in ejectment, brought by

Henry C. King against these two defendants, by his attorney, Maynard F. Stiles, with the notice thereto that declaration will be filed "in the office of the clerk of said circuit court at Charleston, West Virginia," on the first Monday of March, 1895."

These are meager, but, under the circumstances, sufficient proof of the fact that this case was pending in the court at Charleston, and hence falls to the court for the southern district of West Virginia.

If, under the act of January 22, 1902, this case is found to fall among those which belong to the southern district of West Virginia and is not subject to the terms of the proviso to that act, then it should be remanded from this court to the southern district, to be further proceeded in by the circuit court of that district. It may doubtless be true that it is the strong desire of counsel for appellant that his honor Judge Jackson should be afforded the opportunity of dealing with the parties and with their case, with which he has acquired such familiarity and has evinced such profound interest, and between whom and the counsel for the appellant there exists such close and tender relations. But we would proceed decently and in order. The object of the case is set forth in the original bill. The conduct of the attorneys is a mere incident in the proceeding. If contempt of court has occurred, it is of the court, and not of the individual judge who presided in the court. The court survives and can deal with that matter as may appear proper, whoever may be the judge who presides in the court.

HOLMES CONRAD,
For Appellants, So Called.